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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAESAR WRIGHT,
Petitioner,
v.
UNIVERSAL MARITIME SERVICE CORP., ET AL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-889

CAESAR WRIGHT, *Petitioner*

v.

UNIVERSAL MARITIME SERVICE CORP.; STEVENS SHIPPING & TERMINAL COMPANY; STEVEDORING SERVICES OF AMERICA; RYAN-WALSH INC.; and SOUTH CAROLINA STEVEDORES ASSOCIATION, *Respondents*.

STATEMENT OF AMICUS INTEREST

The Commonwealth of Massachusetts, the States of Arizona and West Virginia and the undersigned 10 amici states have a direct interest in the resolution of this case. Many of the amici states, either by judicial order or through legislation, have expressed their strong public policy-based opposition to enforcement of mandatory arbitration clauses contained in collective bargaining agreements where individual statutory rights (as opposed to collective rights) are at issue. The States have a strong public interest in providing a public forum to citizens for the consideration of claims involving important

statutory rights, particularly in the area of employment discrimination. The absence of a public judicial forum impairs deterrence, the establishment of norms of workplace conduct, and the ability to identify systemic discrimination. Mandatory arbitration also undermines the function of State fair employment agencies charged with enforcement of State anti-discrimination laws, which are bypassed when mandatory arbitration is imposed.

STATEMENT OF FACTS

This is a private action alleging disability discrimination. Petitioner Wright was a longshoreman who allegedly was denied employment with Respondent because he suffered and had been compensated for a work-related injury. After he was refused employment, Wright notified his union president of the refusal. The president complained to Respondent that his refusal constituted a violation of the Americans with Disability Act ("ADA"), 42 U.S.C. §12101-12213 (1994), and a violation of the union contract, but he did not file a grievance on Wright's behalf and allowed the period for filing it to lapse. Instead, the union advised Wright to file a charge with the Equal Employment Opportunity Commission ("EEOC") and to seek private legal counsel. When Wright subsequently filed a complaint based upon his charge, that complaint was dismissed because he failed to utilize the mandatory arbitration procedures established under the collective bargaining agreement ("CBA"). That decision was affirmed by the Fourth Circuit in an unpublished decision, *Wright v. Universal Maritime Service Corporation,* dated July 29, 1997, on the ground that *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), mandates the use of arbitration in this situation.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision, if affirmed, would conflict with many States' important interest, reflected in judicial decisions and legislation, in guaranteeing a public forum to citizens who are subject to collective bargaining agreements for consideration of state and federal statutory rights that adhere to them as individuals rather than as collective members of a union.

Affirming the Fourth Circuit's decision in *Wright* to enforce mandatory arbitration clauses in collective bargaining agreements for resolution of important statutory rights in the area of employer/employee relations could conflict with this Court's traditional deference under the Labor Management Relations Act, 29 U.S.C. §§141-188 (1994), to the right of States to determine whether to provide a public forum for state statutory claims.

The Fourth Circuit erred when it applied *Gilmer* in this case to enforce a mandatory arbitration clause, because the legislative history of the ADA indicates a clear intent to preclude mandatory arbitration of discrimination claims.

ARGUMENT

I. THE STATES HAVE AN IMPORTANT INTEREST IN ENSURING THAT THEIR CITIZENS WHO ARE SUBJECT TO COLLECTIVE BARGAINING AGREEMENTS HAVE ACCESS TO COURTS IN ORDER TO VINDICATE EMPLOYMENT RIGHTS THAT DERIVE FROM STATE AND FEDERAL STATUTES.

A. *The Rationale of State Courts for Refusing to Enforce Mandatory Arbitration Agreements is the Distinctive Context of Collective Bargaining.*[1]

If the Court affirms the *Wright* decision and requires that mandatory arbitration clauses contained in collective bargaining agreements be enforced to bar a judicial forum for resolution of rights under state and federal statutes, it will contravene the strong public interest of the States otherwise, as expressed in case law and legislation. Many State courts, for example, either refuse entirely to recognize arbitration clauses under collective bargaining agreements as establishing the exclusive means for resolving individual statutory rights for employees, or refuse to give arbitral decisions preclusive effect. *See Blanchette v. School Committee of Westwood*, 427 Mass. 176, 183, -- N.E.2d

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[1] The amici states support the use of alternative dispute resolution procedures when there is a present dispute or claim and when the parties voluntarily and knowingly agree to resolve a dispute through arbitration.

-- (1998) (employee who arbitrated her state discrimination claim under a mandatory arbitration clause of a CBA not barred from pursuing claim in a judicial forum); *accord*, *Puchert v. Agsalud*, 67 Haw. 25, 677 P.2d 449, 455-56 (1984) (holding that employee could pursue statutory wrongful discharge claim in court and not through arbitration as required by CBA); *Polk County Secondary Roads v. Iowa Civil Rights Comm'n*, 468 N.W.2d 811, 817 (Iowa 1991) (same); *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 73 (Me. 1993), *cert. denied*, 511 U.S. 1069 (1994) (same); *Pike v. Burlington Northern R. Co.*, 273 Mont. 390, 903 P.2d 1352 (1995) (same); *Vaughn v. Pacific N.W. Bell Tel. Co.*, 289 Or. 73, 87, 611 P.2d 281, 290 (1980) (same); *Ryherd v. General Cable Co.*, 124 Ill. 2d 418, 427-29, 530 N.E.2d 431, 435-37 (1988) (employee not barred by mandatory arbitration clause from pursuing action for retaliatory discharge under state workers' compensation laws); *see also Commission of Labor v. Talbert Mfg. Co.*, 593 N.E.2d 1229, 1233 (Ind. App. 1992) (holding that IOSHA claims were not subject to mandatory arbitration clause of a CBA); *Youghiogheny & Ohio Coal Co. v. Oszust*, 23 Ohio St. 3d 39, 41, 491 N.E.2d 298, 300 (1986) (employee not barred by arbitration provision from bringing action under unemployment compensation laws).

The reason for refusing to enforce mandatory arbitration arises partly from the distinctive nature of the collective bargaining context. State courts have recognized, for example, that an employee, merely by being a member of a union that is covered by a CBA with a mandatory arbitration clause, does not waive his or her right to a judicial forum for consideration of a statutory claim that is personal to the employee, as opposed to

collective in nature (like the right to strike) and subject to bargaining. *See Blanchette,* 427 Mass. at 183, -- N.E.2d -- ("Although a union has the power to waive statutory rights related to collective activity, rights of the kind protected by [the Massachusetts' anti-discrimination statute], which are of a personal, and not merely economic, nature are beyond the union's ability to bargain away"); *accord Winston,* 631 A.2d at 73. ("By merely joining a union . . . without specifically contracting to arbitrate statutory employment discrimination claims, an employee is not precluded from asserting such claims in litigation."); *Pike*, 903 P.2d at 1354 (stating that state and federal rights to be free from unlawful sex discrimination "cannot be bargained away as part of a collective bargaining agreement"); *see also Francini v. Pheonix Newspapers, Inc.*, 188 Ariz. 576, 937 P.2d 1382, 1388-89 (Ariz. App. 1996); *Torrez v. Consolidated Freightways Corp.*, 58 Cal. App. 4th 1247, 1258, 68 Cal. Rptr. 2d 792, 799 (1997) (arguing that only "common, contractual rights of the members" can be bargained away); *Ryherd,* 124 Ill. 2d at 426, 530 N.E.2d at 435 (stating that the right to recover for retaliatory discharge is "derived from Illinois public policy" and "[i]t cannot be negotiated or bargained away").

Moreover, State courts have recognized that under most CBAs, the individual employee does not control the advancement of his or her grievance and is dependent on the decision of the union to bring a matter to arbitration, and thereafter to appeal the matter if it is resolved unfavorably. Under these circumstances, the union may reasonably and properly refuse to arbitrate a particular matter, or if it does decide to go forward, arbitrate it with less vigor than likely

would be the case if the employee were pursuing the matter in a State fair employment practices agency or in court. As one State court has noted, "reliance on an employee's union to vindicate adequately the employee's statutory rights may not be justified." *Genovese v. Gallo Wine Merchants Inc.*, 226 Conn. 475, 488, 628 A.2d 946, 952 (1993). In fact, "[b]ecause a union's objective may be to maximize the rights and benefits of its members as a whole, rather than to achieve the best possible outcome for an individual employee in a particular case, a union weighing individual and collective interests might validly allow some employee's statutory rights to be sacrificed." *Id.; see also Youghiogheny & Ohio Coal Co.*, 23 Ohio St. 3d at 44, 491 N.E.2d at 302 (Wright, J., concurring).[2] If the union decides not to pursue an individual case, that in no way implies that the union opposes prosecution of the case by its member. As the present case demonstrates, the opposite is most likely to be true.

State courts have also reasoned that an inherent "tension" exists between contractual and statutory rights when an arbitrator is called upon to decide a statutory matter. *Pike*, 903 P.2d at 1357. The arbitrator's source of authority is the CBA "and his task is to effectuate the intent of the parties . . . by interpreting the agreement in accordance with the law of the shop and the various needs of the employer and the union, rather than in accordance with the law of the land." *Id.*

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[2] This Court similarly has recognized that "even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981).

Moreover, an arbitrator may not take into consideration "the full range of 'public law' and public policy considerations" necessary for an appropriate decision on an individual claim that statutory rights were violated, because his or her "power is both derived from, and limited by, the collective bargaining agreement and the submission of the parties." *Genovese*, 226 Conn. at 486, 628 A.2d at 952; *see also Vaughn*, 289 Or. at 86, 611 P.2d at 289. [3]

B. The Refusal to Enforce Mandatory Arbitration Agreements Is Also Based on the States' Strong Public Interest in Providing a Public Forum for Vindication of Statutory Rights.

States have concluded that it is good public policy to make a judicial forum available for vindication of important statutory rights under various statutes that govern the employment relationship, including the anti-discrimination statutes,

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[3] Indeed, some states statutorily limit an arbitrator to deciding issues related to the interpretation or application of the CBA only, thereby altogether depriving the arbitrator of the power to decide statutory claims. *See Blanchette*, 427 Mass. at 180 (declaring this the effect of Mass. Gen. Law Ch. 150E, § 8 (1996), which provides that a written agreement for binding arbitration in a CBA can "be invoked in the event of any dispute concerning the *interpretation or application* of such written agreement" (emphasis added)); *cf. Youghiogheny & Ohio Coal Co.*, 23 Ohio St. 3d at 41, 491 N.E.2d at 300 (holding that an "arbitrator simply has no authority to invoke this state's unemployment compensation laws in reaching a decision").

regardless of the CBA.[4] The preference for a public forum (as opposed to a private arbitral setting) serves the public interest in a number of important ways. First, public hearings provide education and information to the community as a whole concerning legal and illegal workplace conduct. In addition, rulings by the courts establish precedent. "[T]he courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws." Equal Employment Opportunity Commission, *Enforcement Guidance--Mandatory Arbitration*, Number 915.002 (1997) Employment Pracs. (CCH) ¶5433, at 6173 ("EEOC Enforcement Guidance"). Forcing private mandatory arbitration of discrimination claims for employees subject to CBAs disserves the public by denying an open and fully-developed hearing process.

This function of public judicial decisions applies equally to decisions from State fair employment agencies and is particularly important when the State agency holds public hearings at which evidence is presented and issues written decisions that contain factual determinations and legal rulings.

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[4] Some states have enacted legislation which codifies this right. *See, e.g.*, Conn. Gen. Stat. § 31-51bb (1997) (providing that "[n]o employee shall be denied the right to pursue, in a court of competent jurisdiction, a cause of action arising under the state or federal constitution or under a state statute solely because the employee is covered by a collective bargaining agreement").

See Mass. Gen. Law Ch. 151B, § 3(6) (1996). [5] As this Court has recognized, Congress "affirmatively endorsed state antidiscrimination remedies in Title VII of the Civil Rights Act of 1964." *Lingle v. Norge Div. of Magic Chef, Inc.* 486 U.S. 399, 412 (1987) (citing 42 U.S.C. §§ 2000e-5(c), 2000e-7). Moreover, Congress has recognized the right of the States, under the federal fair employment laws, to have the first opportunity to investigate and prosecute state law discrimination claims. 42 U.S.C. § 2000e-5(d) (1994). Mandatory arbitration of discrimination claims, however, bypasses the State fair employment agencies, as well as the courts.[6]

Moreover, enforced arbitration restricts the flow of information to State fair employment agencies, damaging their ability to monitor, investigate and enforce discrimination rights

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[5] The EEOC procedures allow the Commission or the claimant to file a civil action after conciliation fails. 29 C.F.R. §§ 1601.27, 1601.28 (1997). It does not provide for a public hearing.

[6] This Court noted in *Gilmer* that an employee subject to a mandatory arbitration agreement could still file allegations of discrimination in the Equal Employment Opportunity Commission, even though he or she could not initiate a private judicial action. *See Gilmer*, 500 U.S. at 28. It is unclear, however, whether under a particular state law, an employee could also file in a State fair employment agency. Moreover, even if an employee could file, and assuming that he or she knew of that right, there is no incentive to do so since personal gain is unlikely -- any opportunity to obtain financial remuneration is in the arbitral forum.

within their states for employees subject to CBAs. It also renders it impossible for them to identify industry-wide problems or systemic forms of discrimination in the workplace of employees subject to CBAs. Arbitral resolution of these cases "may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader -- and more accurate -- view of the employers' conduct." EEOC Enforcement Guidance, *supra*, at 6175.[7]

Second, the judicial forum provides important safeguards to assure that a decision is rendered which takes into account the public policy behind a particular statute and the interests it was meant to protect. In the private arbitral setting, however, the focus is on the language of the contract and the smooth functioning of the workplace. As one commentator has noted, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials

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[7] Moreover, review of an arbitral award by a Court is limited. EEOC Enforcement Guidance, *supra*, at 6174 ("[T]here is virtually no opportunity for meaningful scrutiny of arbitral decision-making"). The Federal Arbitration Act ("FAA") provides that arbitral awards can be vacated only for procedural reasons, such as fraud, corruption or misconduct. 9 U.S.C. §10 (1994). This Court has held that an arbitral award can be vacated where it is in "manifest disregard" of the law, *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), or violates public policy that is explicit, well-defined, "dominant" and ascertainable from the law, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), both of which are difficult standards to meet.

who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1673 (1985); *see also Lepore v. National Tool and Mfg. Co.*, 224 N.J. Super 463, 472, 540 A.2d 1296, 1300 (1988) (stating that "an arbitrator ordinarily cannot consider public interest and does not determine violations of law or public policy") (citations omitted).

Finally, the arbitrator is limited in his or her ability to fashion an appropriate remedy for discrimination, and is unable to award the kind of relief that may be imposed by a court or the State fair employment agencies to address systemic problems in the workplace. An agency or a court, for example, can require and enforce company-wide equitable and injunctive relief that has an effect beyond the grievant. Moreover, courts and agencies can impose affirmative obligations on the employer, such as performing diversity training and promulgating zero tolerance policies. An arbitrator, however, is limited to the powers set forth in the four corners of the contract.[8]

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[8] This Court, in a long line of cases, also has repeatedly rejected the view that a decision in an arbitration proceeding brought under a CBA bars a subsequent suit in federal court under a federal statute, when that statute creates an individual right. *See McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984); *Barrentine v. Arkansas-Best Freight Says., Inc.*, 450 U.S. 728, 744 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974). The rationale for these cases is based on the distinctive nature of the CBA context. *Livadas v. Bradshaw*, 512 U.S. 107, 127 n.21 (citing *Gilmer*, 500 U.S. at 33-34). The Fourth Circuit in *Wright* ignored this line of cases

C. Decisions under the Labor Management Relations Act Recognizing the Right of States to Provide a Judicial Forum to Employees Subject to Collective Bargaining Agreements for Resolution of Independent State Statutory Rights Support the Conclusion that the Fourth Circuit's Decision in Wright Should be Reversed.

The Labor Management Relations Act of 1947 ("LMRA" or "the Act"), 29 U.S.C. §173(d) (1994), which applies to collective bargaining agreements, grants federal (and state) courts jurisdiction over claims asserting breach of CBAs, and also authorizes the development of federal common law rules of decision "in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution." *Livadas v. Bradshaw*, 512 U.S. 107, 121-22 (1994).

This Court, however, has specifically limited the pre-emptive reach of the LMRA to avoid intrusion on the traditional powers of the States to legislate in the area of employer/employee relations, including the ability of States to provide a judicial forum for consideration of state law claims. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) ("It would be inconsistent with congressional intent under [the

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and the concomitant rationale when it denied a judicial forum to an employee covered by a CBA who asserted a claim under the ADA. *Wright v. Universal Maritime Service Corp.*, 121 F.3d 702 (1997).

LMRA] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of the labor contract."); *accord Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252 (1994) (noting that employment standards are "within the traditional police power of the State") (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (internal quotation marks omitted)); *see also Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1984) ("States possess the broad authority under their police powers to regulate the employment relationship to protect workers within the State") (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (internal quotation marks omitted)).

Under the LMRA, mandatory arbitration clauses must be enforced for matters involving the interpretation of a CBA but a public forum is available for matters involving independent state and federal statutory rights of employees. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988) (an employee covered by a CBA with a mandatory arbitration clause was held not barred from pursuing her retaliatory discharge action under Illinois workers' compensation laws in Illinois state court); *Livadas*, 512 U.S. at 124-25 (employee subject to a CBA containing an agreement to arbitrate was not prevented by Section 301 of the LMRA from maintaining her state law claim for late payment of wages owed upon discharge); *see also Hawaiian Airlines*, 512 U.S. at 260 (state law cause of action of CBA-covered employee under whistle blower statute is not pre-empted by the Railway Labor Act, where its pre-emption standard is "virtually identical" to Section 301 of the LMRA).

If the Fourth Circuit's decision in *Wright* denying a judicial forum to a CBA-covered employee asserting an independent

federal statutory claim is upheld, courts will soon be asked to enforce mandatory arbitration of state statutory claims as well.[9] This would conflict with this Court's decisions in *Lingle* and its progeny, and should not be the result. To the contrary, this Court has recognized that the States have a substantial interest in providing a judicial forum for employees subject to CBAs to vindicate state statutory rights. *See Lingle,* 486 U.S. at 412

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[9] The Fourth Circuit's unpublished decision in *Wright* -- which required mandatory arbitration of an ADA claim -- was based on its earlier decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), which relied on the "'well-recognized policy of federal labor law favoring arbitration of labor disputes.'" *Id.* at 875 (quoting *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986)); *see also Gilmer*, 500 U.S. at 25 (noting "liberal federal policy favoring arbitration agreements") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted). While application of this policy to require arbitration of state statutory claims would directly conflict with the *Lingle* line of cases, courts will nonetheless be asked to extend its reach to such claims. *See e.g. Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 282 (1995) (holding that Alabama's statute, which rendered pre-dispute arbitration agreements in consumer protection cases unenforceable, was pre-empted by Section 2 of the FAA); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding that California Franchise Investment Law, which invalidates certain arbitration agreements, was pre-empted by Section 2).

("The establishment of labor standards falls within the traditional police power of the State.") (quoting *Fort Halifax Packing*, 482 U.S. at 21) (internal quotation marks omitted). *Wright* should be reversed.

II. ASSUMING ARGUENDO THAT THE COURT INTENDED TO OVERRULE *ALEXANDER V. GARDNER-DENVER* IN *GILMER*, THAT HOLDING WAS OVERRULED BY CONGRESS WHEN IT PASSED THE 1991 CIVIL RIGHTS ACT.

Assuming that the Fourth Circuit was correct in concluding that it was this Court's intent in *Gilmer* to compel the beneficiaries of those collective bargaining agreements which provide for mandatory arbitration to arbitrate their statutory discrimination claims, that requirement was discarded when Congress subsequently passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). That Act, among other things, amended both the enforcement provisions of the federal 1964 Civil Rights Act, 42 U.S.C. § 2000e-5 (1994), and the ADA, 42 U.S.C. § 12117 (1994). The legislative history of the Act unambiguously rejected pre-dispute mandatory arbitration agreements.[10]

Section 118 of the Civil Right Act of 1991 speaks directly

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[10] Although the legislative history of the Civil Rights Act of 1991 refers explicitly to Title VII, Congress specifically imported the enforcement scheme of Title VII into the ADA, making these amendments equally applicable there. See 42 U.S.C. § 12117 (1994).

to the issue of the arbitrability of Title VII claims. That section encourages the use of alternative dispute resolution "where appropriate and to the extent authorized by law." Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as a historical and statutory note to 42 U.S.C. § 1981 (1994)). The House reports on this section explicitly state that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 102-40(I) at 97 (1991), H.R. Rep. No. 102-40(II) at 41 (1991). They went on to explain that, consistent with this Court's decision in *Alexander v. Gardner-Denver*, the encouragement of alternate dispute resolution in the Act was intended to "supplement, not supplant" existing remedies otherwise available in the statutory enforcement scheme. *Id.* Speaking to proposed section 118, then-Senate Minority leader Robert Dole noted that the section encouraged arbitration only "where the parties knowingly and voluntarily elect to use these matters." 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

Congress further underscored its support of *Alexander v. Gardner-Denver* by rejecting a proposed amendment which would have implicitly endorsed mandatory arbitration agreements by encouraging the use of arbitration "in place of judicial resolution." The Education and Labor committee explained that such agreements would have allowed employers to "refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints" and that this "would fly in the face of Supreme Court decisions

holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights . . . ." H.R. Rep. No. 102-40(I) at 104 (1991). The committee concluded that "American workers should not be forced to choose between their jobs and their civil rights." *Id.*

Although the greater part of the legislative debate involving the 1991 Civil Rights Act occurred prior to *Gilmer*, the final debate over the bill occurred after the decision and immediately prior to the Act's passage on November 7, 1991. During that debate, the chair of the House Committee on Education and Labor reiterated that Section 118 was "intended to be consistent with . . . *Alexander v. Gardner-Denver,*" and added:

> This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer*.... or any application or extension of it to Title VII.

137 Cong. Rec. H9595-01, H9530 (Nov. 7, 1991). Only Representative Henry Hyde, who had urged that the bill not be passed, H.R. Rep. No. 102-40(II) at 80 (1991), contended that section 118 permitted binding arbitration, 137 Cong. Rec. H9505-01, H9548 (Nov. 7, 1991), and conceded that binding arbitration could occur only "where the parties knowingly and voluntarily elect to use these methods." *Id.*

Aside from the legislative history of the Act, the language of the amendments clearly indicates that Congress did not intend

to compel the use of binding alternative dispute resolution mechanisms, or to permit agreements to use alternative dispute resolution to be entered into before a dispute arose. For example, Section 118 of the Act speaks of settlement negotiations, conciliation, facilitation, mediation, fact-finding and mini-trials, not of binding arbitration. See Civil Right Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). Title VII's goal of "encouraging voluntary settlement" is referred to several times, both in the legislative history and throughout the Act, but always in the context of the resolution of existing claims. Further, despite every opportunity to remove them, Congress retained in the new enforcement provisions an absolute right to seek relief in court when alternative dispute resolution efforts failed.

This legislative history of the 1991 Civil Rights Act serves two purposes in the context of this case. It definitively establishes Congress' intent to permit Title VII and ADA claimants to rely on *Alexander v. Gardner-Denver*, notwithstanding any subsequent contrary holding in *Gilmer*, and it establishes the clear Congressional intent necessary to overcome a presumption of arbitrability under the standards set out in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

For these reasons the Court should conclude that any presumption in favor of arbitrability has been overcome, that the legislative history of the ADA does not permit binding arbitration of ADA claims, and that Wright should not be denied his statutory right to a judicial forum for his claim of disability discrimination.

CONCLUSION

For the foregoing reasons, the amici states respectfully request that the Court reverse the Fourth Circuit decision in this case.

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